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I. INTRODUCTION

Copyright, as it is constructed under international conventions and copyright laws worldwide, has continuously expanded in duration, scope, and subject matter.[1] The expansionist trend of copyright has

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[1] Since its adoption in 1886, the *Berne Convention for the Protection of Literary and Artistic Works*, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention] has gone through many revisions to augment the protection of the exclusive rights of copyright holders. Revisions were made in 1908 (in Berlin), in 1928 (Rome), in 1948 (Brussels), in 1967 (Stockholm), and in 1971 (Paris). Other amendments were made in 1979. *See Berne Convention for the Protection of Literary and Artistic Works*, Sept. 9, 1886, 828 U.N.T.S. 221 (amended on Sept. 28, 1979), online: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html. *See also* 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS, THE BERNE CONVENTION AND BEYOND ch. 3 (2d ed. 2006). Any subsequent

intensified in recent years, in response to the disruptive threats posed by the digital environment to its subsistence.[2] Manifest in all corners, including international organizations, legislative reform committees, policy papers, copyright scholar commentaries, interest groups and civil society movements, the heated debate persists on the merits and justifications for such an expansion.[3] More particularly, the effects of

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international agreements adopted under the Berne Convention, such as the WIPO Copyright Treaty, Dec. 20, 1996, WO033EN, online: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html [hereinafter WCT] and WIPO Performances and Phonograms Treaty, Dec. 20, 1996, WO034EN, online: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [hereinafter WPPT], must secure greater protection for copyright holders. *See* Berne Convention, art. 20. Parts II and III of the Agreement on the Trade Related Aspects of Intellectual Property Law, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 29 [hereinafter TRIPS], create minimum standard obligations for the protection and enforcement of intellectual property rights, including copyright.

[2] *Id.* The latest manifestations of the increased protection of intellectual property (in particular copyright) at the international and national levels impact more specifically online service providers and online users of copyright works by providing additional enforcement powers to copyright holders in the digital environment. The French law of 2009, Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet [ACT No. 2009-669 of June 12, 2009 Promoting the Distribution and Protection of Creation on the Internet] [hereinafter HADOPI], the UK Digital Economy Act of 2010, Digital Economy Act, 2010, c. 24 (U.K.), and the signature of the Anti-Counterfeiting Trade Agreement in 2011, Anti-Counterfeiting Trade Agreement, opened for signature May 1, 2011, available at http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc 147937.pdf [hereinafter ACTA]., illustrate a new wave of regulation toward strengthening the means by which copyright holders can enforce their exclusive rights and deter copyright infringement. For a discussion on the procedural adoption and substantive issues around ACTA, *see* Peter K. Yu, *Six Secret (and now open) Fears of Acta,* 64 SMU L. REV. 975 (2011). In Canada, Bill C-8, an Act to amend the Copyright Act and the Trade-marks Act and to make consequential amendments to other Acts, 2d Session, 41st Parl., 2013(Third Reading, October 2, 2014), if adopted, will further amend Canada Copyright Act, R.S.C. 1985, c. C-42, by strengthening the civil and criminal remedies for copyright infringement.

[3] Attempts in the United States to introduce similar laws have met fierce resistance from intermediaries and from members of the public, one culminating point being the complete blackout of Wikipedia for one day in January 2012. Amy Goodman, *The SOPA blackout protest makes history*, THE GUARDIAN, Jan. 18, 2012, http://www.guardian.co.uk/commentisfree/cifamerica/2012/jan/18/sopa-blackout-protest-makes-history. In the United States, the Bill introduced in the House of Representatives, the Stop Online Piracy Act [hereinafter SOPA], Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011), and the Bill introduced in the Senate, Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act [hereinafter PIPA], Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011), were subsequently abandoned. *See* Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 20, 2012, http://www.theguardian.com/commentisfree/cifamerica/2012/jan/18/sopa-blackout-protest; Stephanie Condon, *PIPA, SOPA put on hold in wake of protests*, CBS NEWS, Jan. 20, 2012, http://www.cbsnews.com/news/pipa-sopa-put-on-hold-in-wake-of-protests/. At the international level, the future of *ACTA* is uncertain. In July 2012, in

copyright expansion on the desirable balance that needs to be struck between the rights and interests of copyright holders, users, intermediaries and the public are questioned and scrutinized.[4]

Whether copyright is property continues to ignite passionate debate, more than 300 years after the entry into force of the Statute of Anne.[5] At the heart of the controversy lie various conceptions of property, as well as the causal effect between characterizing copyright as property and its rapid expansion. For some, the expansion of copyright is attributable to the *propertization* of copyright.[6] For others, the root causes for the expansion of copyright must be sought

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an unprecedented move, the European Parliament formally rejected the ratification of ACTA by the EU. *See* Charles Arthur, *Acta down, but not out, as Europe votes against controversial treaty*, THE GUARDIAN, July 4, 2012, http://www.guardian.co.uk/technology/2012/jul/04/acta-european-parliament-votes-against. The eventual ratification of ACTA by the EU and its Member States had given rise to broad opposition across Europe, the main fear being its limitations on Internet freedom. *Id.* The proposed terms of and clout of secrecy under which the negotiations for the Trans-Pacific Partnership (TPP) Free Trade Agreement have been conducted have also given rise to serious criticism. *See, e.g.*, Letter from Joseph Stiglitz to TPP negotiators (December 6, 2013).

[4] Discussions on the need to balance competing interests in copyright law have been central in legislative reform, public policy, and scholarly debates. For example in Canada, for a great part of the lengthy copyright legislative reform that has eventually led to the entry into force of the Copyright Modernization Act, S.C. 2012, c. 20; more specifically, Bill C-32, an Act to amend the Copyright Act, B. C-32, 3d Sess., 40th Parl., 2010 (1st reading June 2, 2010) and Bill C-11, an Act to amend the Copyright Act, B. C-11, 1st Sess., 41st Parl., 2011 (which became the Copyright Modernization Act), the Government of Canada labeled the initiative "Balanced Copyright," and the Government website address where it communicated recent developments on copyright law around the entry into force of the Copyright Modernization Act was labelled "balancedcopyright.gc.ca." Amongst scholarly work, *see, e.g.*, THOMAS DREIER, BALANCING PROPRIETARY AND PUBLIC DOMAIN INTERESTS: INSIDE OR OUTSIDE OF PROPRIETARY RIGHTS?, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 295 (Rochelle Cooper Dreyfuss et al. eds., 2001); FROM RADICAL EXTREMISM TO BALANCED COPYRIGHT: CANADIAN COPYRIGHT AND THE DIGITAL AGENDA (Michael Geist ed. 2010); OVERVIEW OF NATIONAL REPORTS ABOUT 'BALANCING COPYRIGHT' (Reto Hilty et al. eds.,2012), http://ssrn.com/abstract=2040607, reprinted in BALANCING COPYRIGHT - A SURVEY OF NATIONAL APPROACHES (MPI STUDIES ON INTELLECTUAL PROPERTY AND COMPETITION LAW) 1-78 (Reto Hilty et al. eds., 2012). The report surveys reports submitted by scholars with respect to 40 countries worldwide (including Canada, the United States, the United Kingdom, and France) about how each jurisdiction approaches the concept of balancing competing interests in copyright law.

[5] *See* The Statute of Anne, 8 Anne c. 19 (1710) (An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned); *see* CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW (Helena Howe et al. eds., 2013) (focusing, in several chapters, on the property attributes of copyright); *see also* discussion *infra* Part II and Part III.

[6] *See* discussion *infra* Part II.

elsewhere, or the so-called expansionist effects of qualifying copyright as property are attributable to a misconception of property.[7]

The primary goal of this article is to look at the property attributes of copyright to inform a more nuanced understanding of the nature of copyright that emphasizes its distinct character. I resort primarily to James W. Harris' theory in *Property and Justice,*[8] and in particular, on the insights that his characterization of property as the twin manifestation of trespassory rules and of an ownership spectrum, bring to the understanding of copyright.[9] While copyright holders' right to exclude has been a focal point in copyright theory,[10] looking at copyright through trespassory rules and the ownership spectrum allows me to discern two distinct yet interrelated property interests that bring a more refined understanding of the property attributes of copyright.

The first interest relates to copyright as a whole when considered as the *thing* that is the object of commercial exploitation, which satisfies all requirements of a proprietary ownership interest.[11] The second interest focuses on the nature of copyright holders' relationship to the physical embodiment of their works (e.g. the commercial copies owned by consumers or other users): it emerges as a limited, remote, non-ownership proprietary interest.[12] Viewing copyright through the combination of the bundle of rights as an object of commodification and the more limited rights that copyright holders have with respect to disseminated copies of their works puts greater emphasis on the property attributes of copyright while underscoring their limited scope. For instance, viewing copyright through two distinct proprietary interests confirms that copyright holders cannot *own* their works once they are commercialized. This illustrates how a property lens may in fact narrow the scope of copyright, and challenge the perception that associating copyright to property inevitably leads to its expansion.[13] As copyright holders' legal and technical powers of control increase, as much as users' power of uses of copyright works multiply, the temptations of drifting one way or the other on the debate regarding the property attributes of copyright are high. I argue that

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[7] *Id.*

[8] JAMES W. HARRIS, PROPERTY AND JUSTICE (1996).

[9] *Id.* at 5. The ownership spectrum spans from "mere property" to "full-blooded ownership." *See* discussion *infra* Part III.

[10] *See* Wendy J. Gordon, *An Inquiry into the Merits of Copyright: the Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1365-78 (1989); HUGH BREAKEY, *Properties of Copyright*, in CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW, *supra* note 5, at 137; discussion *infra* Part III.

[11] *See* discussion *infra* Part III.A.

[12] *See* discussion *infra* Part III.B.

[13] *See* discussion *infra* Part III. B.

misinterpreting the consequences of the property attributes of copyright may lead to unwarranted expansion, but that distancing copyright from property for fear of expansionism is problematic from a legal and normative standpoint. Acknowledging the property attributes of copyright has the important additional benefit to reveal more sharply the inherent tension that subsists between the competing property rights of copyright holders and users in the embodiment of the works. It levels the playing field by minimizing the tendency to apply double standards to the competing rights.

In Part II, I discuss the ongoing debate on the nature of copyright as a form of property, and how the controversy stems from divergent conceptions of property. I challenge the notion that associating copyright with property necessarily contributes to the expansion of copyright. In Part III, I look at the attributes of copyright and how they compare to other forms of tangible property through the application of property law and theory. I conclude in Part IV by defining copyright as a limited form of property that includes a property interest in the embodiment of works (e.g. commercial copies of copyright works) and by reflecting on the insights that this characterization brings to the debate on the nature of copyright.

II. THE ONGOING DEBATE: IS COPYRIGHT PROPERTY?

Copyright has been described as a monopoly,[14] as a regulatory right or privilege,[15] as a construction of statute,[16] as an intellectual

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[14] R. J. Roberts, *Canadian Copyright: Natural Property or Mere Monopoly*, 40 CAN. PATENT REPORTER 2d, 33 (1979); Pierre-Emmanuel Moyse, *La nature du droit d'auteur: droit de propriété ou monopole?*, 43 McGILL L.J. 507 (1998).

[15] *See* L. Ray Patterson, *Free Speech, Copyright and Fair Use*, 40 VAND. L. REV. 1, 8 (1987); William Patry, MORAL PANICS AND THE COPYRIGHT WARS 110 (2009) (describing how, historically, copyright in the United States has always been regarded as a regulatory privilege, not as a property right); Mikhaïl Xifaras, LA PROPRIÉTÉ ETUDE DE PHILOSOPHIE DU DROIT 411, 425 (2004) (describing copyright as a privilege); Tom W. Bell, *Copyright as Intellectual ~~Property~~* Privilege, 58 SYRACUSE L. REV. 523 (2008).

[16] Compo Co. v. Blue Crest Music Inc., [1980] 1 S.C.R. 357, ¶23 (Can.); *see also* Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, [2004] 2 S.C.R. 427, para. 82 (Can.) (whereby the Court lists previous judgments by the Supreme Court having made the same statement).

right,[17] as a government subsidy,[18] as property,[19] and as akin to a dismemberment of ownership (i.e. usufruct).[20] At first sight, the statutory construct of copyright exhibits characteristics that are commonly associated with property. The exclusionary rights that copyright laws typically confer on copyright holders in relation to a work can be assigned in whole or in part, licensed, donated, or bequeathed as an object of commodification.[21] Copyright holders' exclusive rights are opposable to all,[22] and, when infringed, entitle

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[17] SÉVERINE DUSOLLIER, DROIT D'AUTEUR ET PROTECTION DES OEUVRES DANS L'UNIVERS NUMÉRIQUE 322-23 (2d ed. 2007) (defining the nature of copyright (as well as other intellectual property rights) as a limited right of exploitation to the public that does not involve the use or enjoyment of a resource which contrasts it with property).

[18] *See* Mark A. Lemley, *Property, Intellectual Property and Free Riding,* TEXAS L. REV. 1031, 1069ff (2005) (making an analogy to real property, tort, government subsidy, and government regulation, concludes that no analogy is fully adequate but the closest one is probably a government subsidy as it underlies the trade-off at play better than talking about it as a real property right).

[19] *See, e.g.*, Desputeaux v. Éditions Chouette, [1987] 2003 S.C.C. 17, para. 57 (Can.) ("the Copyright Act deals with copyright primarily as a system designed to organize the economic management of intellectual property, and regards copyright primarily as a mechanism for protecting and transmitting the economic values associated with this type of property and with the use of it"); *see also Euro-Excellence Inc. v. Kraft Canada Inc.*, [2007] S.C.C. 37, ¶¶ 27-39 (Can.); *BMG Canada v. John Doe*, [2005] F.C.A. 193, para. 41, (Can.); Cie Générale des établissements Michelin v. C.A.W. Canada, [1996] 71 C.P.R. 3d, 348 (Can.). For a historical perspective on the debate around the nature of copyright, i.e. either as a monopoly, property or creation of statute, *see* Harold G. Fox, *The Canadian Law of Copyright* (1944) at 7-11 (reviewing the three characterizations of copyright and concluding that copyright is incorporeal property); *see also* HARRIS, *supra* note 8, at 42-47; David Vaver, *Canada's Intellectual Property Framework: A Comparative Overview*, 17 I.P.J. 125, 135 (2004); R. HUGHES, S. PEACOCK & N. ARMSTRONG, HUGHES ON COPYRIGHT & INDUSTRIAL DESIGN 101 (2d ed. 2005) (referring to copyright as intangible incorporeal property); DUSOLLIER, *supra* note 17, at 314-23 (reviewing doctrinal works qualifying copyright as property and the various arguments for and against the qualification of copyright as property); Peter S. Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love Or Doomed Relationship?*, 34 ECOLOGY L.Q. 713, 721 (2007); Richard A. Epstein, *Liberty versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. R. 1 (2005); Adam Mossoff, *Is copyright property?*, 42 SAN DIEGO L. REV. 29 (2005); Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455 (2010).

[20] *See* David Lametti, *The Concept and Conceptions of Intellectual Property as seen through the lens of Property*, in Scienza e Diritto nel Prisma del Diritto Comparato 282 (G. Comandé et al. eds., 2004) (finding some commonality between copyright and one of the dismemberment of ownership, i.e. usufruct, acknowledging that copyright in the end still shares the attributes of a property right).

[21] *See, e.g.*, United States Copyright Act of 1978, 17 U.S.C. § 201 (2006); Canada Copyright Act, *supra* note 2, at § 13(4)-13(7); *see* Fiona MacMillan, *Copyright and Corporate Power*, in COPYRIGHT AND THE CULTURAL INDUSTRIES 99-118 (Ruth Towse ed., 2002); Fiona MacMillan, THE CRUEL (C): COPYRIGHT AND FILM, 24 EUROPEAN INTELL. PROP. REV. 483, 484 (2002).

[22] *See, e.g.*, 17 U.S.C. § 501 (2006); Canada Copyright Act, *supra* note 2, § 27 (1) ("[i]t is an infringement of copyright for any person to do, without the consent of the

copyright holders to civil remedies by way of injunction, damages, accounts, delivery up, and that may be conferred otherwise by law.[23] Copyright infringement can also give rise to criminal sanctions.[24] While courts will at times distance copyright law from property law,[25] property and ownership parlance is commonly used to describe copyright in judicial decisions.[26]

While copyright shares important attributes with other forms of property,[27] there is an ongoing debate on the nature of copyright and other intellectual property rights, and more particularly around the effects of assimilating copyright to property.[28] I will deal with the debate on the property attributes of copyright at a substantive level below in this article.[29] At this point, I will limit my remarks to the political dimension of associating copyright with property in contemporary copyright discourse.

Commentators, including Neil Weinstock Netanel, Lawrence Lessig, and William Patry, describe how the assimilation of copyright to private property generally serves the proponents of strong copyright holders' rights.[30] The analogies and metaphors employed by Jack Valenti, as president of the Motion Picture Association of America, equating cultural property to the strongest forms of private property (and the need to give the former the same level of protection as the

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owner of the copyright, anything that by this Act only the owner of the copyright has the right to do").

[23] *See* US Copyright Act, *supra* note 21, at § 502-05; Canada Copyright Act, *supra* note 2, at § 34(1).

[24] *See* US Copyright Act, *supra* note 21, at § 506; Canada Copyright Act, *supra* note 2, at §§ 42-43.

[25] The Supreme Court of Canada has on numerous occasions distanced copyright law from property law, *see* Blue Crest Music Inc., *supra* note 16, at para 23 (where Justice Estey states, in a unanimous judgment, "copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct, nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute").

[26] *See Desputeaux*, *supra* note 19; *see also Euro-Excellence Inc.*, *supra* note 19; *BMG Canada*, *supra* note 19; *Cie Générale des établissements Michelin*, *supra* note 19.

[27] *E.g.*, copyright can be assigned in whole or in part, licensed, donated or bequeathed, and copyright is opposable to all; *see also* discussion *infra* Part III.

[28] *See* Epstein, "Liberty Versus Property" *supra* note 19; Mossoff, *supra* note 19; Hanoch Dagan, *Property and The Public Domain*, 18 YALE J.L. & HUMAN. 84 (2006); DUSOLLIER, *supra* note 17, at 309-28; MICHAEL SPENCE, INTELLECTUAL PROPERTY 13-15 (2007); Menell, *supra* note 19; Patry, *supra* note 15, at 109-31.

[29] *See* discussion *infra* Part III (on the property attributes of copyright).

[30] *See* NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 6-8 (2008); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 116ff (2004); Patry, *supra* note 15, at 109-32.

latter) are frequently cited examples of the use of strong tangible property rhetoric to secure more robust intellectual property rights.[31] Lingo that is traditionally associated to tangible property, e.g. fencing-off, theft, and piracy is frequently used with respect to intellectual property and carries with it a powerful imagery that for some has or may have contributed to the progressive expansion of the scope of copyright.[32]

Those who favor a robust public domain, or advocate for greater alignment between copyright entitlements and First Amendment rights or freedom of expression, and the need to give greater consideration to copyright users and other competing interests, warn against the dangers of the *propertization* of copyright.[33] It is not always clear that warnings against associating copyright with property are necessarily a rejection that copyright can be a form of property.[34] While commentators who point to the perils of equating copyright with other forms of tangible property will sometimes concede that different conceptions of property can lead to different opinions about the scope of copyright,[35] they generally view the association of copyright with property as a dangerous "slippery slope" that is contributing to the progressive expansion of copyright holders' exclusive rights.[36] Because of the

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[31] *See* LESSIG, *supra* note 30, at 116ff; Patry, *supra* note 15, at 109ff.

[32] *Id.*; NETANEL, *supra* note 30 (arguing that assimilating copyright to a Blackstonian view of property is responsible for its progressive expansion).

[33] *See* Patry, *supra* note 15, at 114; NETANEL, *supra* note 30. *See also* Carys Craig, *Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEEN'S L.J. 1, 58 (2002) (describing the effects of the Lockean reasoning to defend copyright, starting with the author's entitlements, and working backwards to set its limits as opposed to starting the analysis with the public domain and then justifying authors' right to control in terms of encouragement to create).

[34] *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS 6 (2001) (questioning the need to rethink property, not questioning property *per* se); *see also* JAMES BOYLE, THE PUBLIC DOMAIN, ENCLOSING THE COMMONS OF THE MIND 4 (2008) (inviting us to define the public domain and to rethink the scope of intellectual property rights, while not rejecting the property regimes surrounding intellectual property *per se*, including copyright). *See also* LESSIG, *supra* note 30, at 172.

[35] *See, e.g.*, Craig, *supra* note 33, at 13, 40-41.

[36] *See* Craig, *supra* note 33 (warning against the detrimental effects on the copyright system of a pervasive Lockean rights-based view of property applied to copyright in copyright case law, that focuses on the relationship between the author and her work as opposed to centering on the relationship between the work and the public and the incentive-based system that needs to be put in place to encourage the creation and dissemination of works); *see also* Patry, *supra* note 15, at 114; NETANEL, *supra* note 30, at 6-8, 57-80 (detailing the various expansions of copyright in recent years (e.g. in duration, scope, through technological protection measures), but it is not always clear, whether such expansion is attributable to associating copyright to property). *See also* Neil Weinstock Netanel, *Shyamkrishna Balganesh, Debunking Blackstonian Copyright, Copyright's Paradox*, 118 YALE L.J. 1126, 1138-39 (2008).

uncertain contours of intellectual property and copyright, the application of property reasoning to such abstract concepts or intangibles may present an even greater danger of expansion in relation to other forms of tangible property.[37]

In response to warnings against the effects of the *propertization* of copyright, other commentators attribute the so-called "expansionist effects" of qualifying copyright as property and the polarization it creates between copyright absolutists and copyright minimalists to a misconception of property.[38] Rather than a monolith of unlimited exclusionary powers, property is a heterogeneous legal institution that is intrinsically subject to limitations and obligations.[39] The property institution can serve the interests of defenders of the public domain as much as they do the interests of the copyright holders. In that view, the proponents of a strong public domain stand an even better chance at constraining copyright expansionist arguments inside the property institution itself, rather than by invoking less-defined concepts external to it.[40]

The persistence with which some commentators insist that copyright is not property serves, at times, the overt purpose of distancing copyright from a natural property right.[41] This motive, it seems, confuses the nature of property with how it is sometimes justified, e.g., as a natural right, which is not a *sine qua non* condition for the existence of property.[42] Commentators who guard against the

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[37] *See* discussion *infra* Part III on *Cie Générale des établissements Michelin*, *supra* note 19; *see also* Craig, *supra* note 33, at 40-41.

[38] *See* Dagan, *supra* note 28, at 86; Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251 (2011); EDUARDO MOISE PENALVER & SONIA K. KATYAL, PROPERTY OUTLAWS 43 (2010).

[39] *Id.* LESSIG, *supra* note 30, at 72 (sharing the view that copyright is property; however emphasizing how we need to take into account the balancing of competing interests that are at stake and define its scope accordingly).

[40] *See* Dagan, *supra* note 28, at 92; Newman, *supra* note 38, at 278; *see also* David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 705 (2010); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. Rev. 139 (2009); Emily Hudson & Robert Burrell, *Abandonment, Copyright and Orphaned Works: What Does It Mean to Take the Proprietary Nature of Intellectual Property Rights Seriously?*, 35 MELB. U. L. REV. 971 (2011).

[41] Roberts, *supra* note 14, at 34, Patterson, *supra* note 15. Other commentators have raised the reticence of qualifying copyright as property for political reasons including fear of the feudalist implications that the association of intellectual work protected by copyright with property may lead to. *See* XIFARAS, *supra* note 15, at 414. *See also* PATRY, *supra* note 15, at 112ff.

[42] Even though the existence of a natural right to property is the object of an ongoing debate, in an Anglo-American context, instrumentalism, and in particular utilitarianism, is often viewed as the most influential justification for the existence of private property. *See* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 3 (1988). In the United States, instrumentalist theories are often invoked to justify copyright.

characterization of copyright as property confront a specific view of property, including a right-based view of property that opposes any form of regulation or interference with property, and as a powerful right that precedes the state.[43] At other times, the underlying purpose of distancing the nature of copyright from property is to avoid the perceived absolutism and expansionist effects associated with the *prima facie* open-ended privileges and powers of property.[44]

A striking example of the perils of interpreting the scope of copyright by using the analogy of strong tangible private property rights is the judgment in *Cie Générale des établissements Michelin v. C.A. W-Canada Michelin*.[45] The plaintiff, Michelin, sought an injunction against defendants CAW Union and others based on trademark and copyright infringement for the use of the Bibendum (Michelin man) logo owned by Michelin. In an attempt to unionize the employees of Michelin Canada, CAW Union distributed various leaflets depicting the Bibendum logo in humorous or satirical ways. CAW Union was not successful in arguing that its use of the Bibendum logo was permissible as a parody or satire.[46]

Under the U.S. Constitution, Congress's power with respect to copyright (and patents) is "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. CONST. art. I, § 8, cl. 8. *See also* William W. Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 169-73 (Stephen R. Munzer ed. 2001); SUNNY HANDA, COPYRIGHT LAW IN CANADA 75 (2002). Under HARRIS, *supra* note 78, theory of property, the creator-incentives instrument is the sole plausible justification for creating private property through copyright. *Id.* at 296ff.

[43] *See NETANEL*, *supra* note 30, at 6-8; Patry, *supra* note 15, at 97-132. *See also* Craig, *supra* note 33.

[44] *See, e.g.*, NETANEL, *supra* note 30; PATRY, *supra* note 15, at 114; s*ee also* Craig, *supra* note 33 (guarding against the expansionist effects of a Lockean rights-based view of copyright).

[45] *Cie Générale des établissements Michelin*, *supra* note 19, at para. 84 (where the court referred to plaintiffs Michelin's copyright in the Bibendum logo as private property, responding to an argument by defendants that copyright had to be analogized to a form of public property). For a discussion of this case, *see* Jane Bailey, *Deflating the Michelin Man: Protecting Users' Rights in the Canadian Copyright Reform Process*, in IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 125 (Michael Geist, ed., 2005); *see also* Carys Craig, *Putting the Community in Communication: Dissolving the Conflict between Freedom of Expression and Copyright*, 56 U. TORONTO L. J. 75 (2006).

[46] Until the amendments to Canada's Copyright Act, in 2012, adding parody or satire as one of the purposes under which the fair dealing exception to copyright infringement applies, (Canada Copyright Modernization Act, *supra* note 4, § 21 amending § 29 of the Copyright Act, *supra* note 2), it did not provide an exception to copyright infringement based on parody or satire as was already the case in other jurisdictions. In the U.S., parody can be invoked as an exception to copyright infringement and is assessed under the fair use doctrine. *See* 17 U.S.C. § 107 (1992); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994). In France, *see* C.P.I.

One of CAW Union's defences in *Michelin* was based on the *Canadian Charter of Rights and Freedoms*[47] arguing that their posters and leaflets depicting the Bibendum logo were forms of expression protected by section 2(b) of the *Charter* and that the Canadian Copyright Act was unconstitutional to the extent that it forbade such use.[48] Justice Teitelbaum, for the Federal Court (trial division) rejected that argument, holding that "The *Charter* does not confer the right to use private property—the Plaintiff's copyright—in the service of freedom of expression." [49] The court granted injunctive relief to Michelin, ordering CAW Union to stop using the Bibendum logo on its leaflets.

Throughout its reasons for judgment in *Michelin*, the Court emphasized the private property nature of copyright and relied on case law that stated that the exercise of freedom of expression did not give the right to use someone else's private property.[50] Even if the Court acknowledged that the use of the copyright (private property) of Michelin was different from the use of private property as the location for the exercise of the freedom of expression, it nevertheless held that an analogy could be made between the two to ultimately conclude that the use of private property was a prohibited form of expression under the *Charter*.[51]

By analogizing the reproduction of the *Bibendum*, a work protected by copyright and as a trademark, to the use of tangible private property, the Court failed to recognize important differences between the nature of copyright and the nature of ownership rights in tangible property, such as land or equipment. Among the differences, reproduction of the Bibendum was non-rivalrous, i.e. it did not deprive Michelin of the enjoyment of its property, nor was there any intrusion

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art. L122-5 4°.

[47] Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

[48] *Michelin*, *supra* note 19, at paras. 82-6. For a discussion of this judgment and on the interaction between copyright and freedom of expression, *see* Craig, *supra* note 45.

[49] Michelin, *supra* note 19, at para. 85.

[50] *Id.* at paras. 94-118 (the Court referred mainly to three judgments: Committee for the Commonwealth of Canada v. Canada, [1991] 77 D.L.R. 4th 385 (Can.); Harrison v. Carswell, [1975], 62 D.L.R. 3d 68 (Can. Man. C.A.), and New Brunswick Broad. Co. Ltd. v. CRTC, [1984] 2 F.C. 410 (Can. Ont.)).

[51] *Michelin*, *supra* note 19, at para. 107 ("[t]he Defendants have used private property not as a forum but as a means of conveying a message. However, despite these differences, I reason by analogy to *Commonwealth* that I am permitted to consider the parties' interests even before the Section 1 stage of the analysis in order to examine the scope of the Defendants' freedom of expression under Section 2(b) and determine if the expression is in a prohibited form. I hold that it is reasonable to equate doing something on private property as a forum for expression with using the property - the copyright - to convey expression").

involved. The use of the Bibendum was not one that competed with the economic rights of Michelin's copyright work, which could have supported a form of "deprivation of enjoyment" argument by Michelin under a tangible private property law analysis.[52] The reproduction by the defendants of Michelin's copyrighted work and trademark calls for a different rationale than the one that withstands the balancing act at play in cases involving the use of other forms of private property to exercise freedom of expression. The Court was concerned to offer copyright holders less protection than other "full property owners" on the basis that they held an intangible right.[53] The Court likely implied the strongest form of exclusionary rights that can be conferred on property owners, i.e. those invested with "full-blooded ownership."[54] It is as if the private property nature of copyright did not give the court the choice to treat copyright differently.

Although the open-ended texture of property can lead to expansionism,[55] this is not necessarily an account of what property is. Property is not absolute: it is the object of various forms of limitations.[56]

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[52] The effect of the use on the work protected by copyright, e.g. its commercial exploitation is also one of the criteria to consider to determine whether the dealing of the work is fair or not. *See* CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] S.C.R. 13, para. 59 (Can.).

[53] *Michelin*, *supra* note 19, at para. 109 ("[c]opyright is an intangible property right. The owner therefore has a more challenging task in asserting his or her control over the use of the property. Launching an action for infringement under the aegis of the *Copyright Act* is the owner's prime tool for asserting his or her rights. But just because the right is intangible, it should not be any less worthy of protection as a full property right" (*quoting* Ladbroke (Football) Ltd. v. William Hill (Football) Ltd., [1964] 1 W.L.R. 273, 291 (H.L.)).

[54] HARRIS, *supra* note 8, at 5, 30.

[55] Different theoretical justifications of property can have an impact on a more expansive or restrictive view of property. *See* Pascale Chapdelaine, *The Copyright Consumers' Bargain, Defining the Rights to Commercial Copies of Copyright Works* (Doctor of Philosophy Thesis, York University Graduate Program in Law, 2013) [unpublished] at 199-224 (discussing the various theoretical justifications of (intellectual) property and their effect on the scope of copyright and ownership of commercial copies of copyright works).

[56] For example, this principle is reflected in Québec's Civil Code, "[o]wnership is the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law." Civil Code of Québec, S.Q. 1991, c. 64, art. 947 (Can.). *See also* HARRIS, *supra* note 8, at 32-34, 37-38, 332-61(describing various forms of limitations to property including "property-independent limitations," "property-limitation rules," expropriation rules and conceptual limitations to property. A communitarian approach to property conveys the similar idea that ownership entails obligations and thus limitations that are justified by the necessity to promote human flourishing in the communities we live in. *See, e.g.,* Gregory S. Alexander & Eduardo M. Penalver, *Properties of Community*, 10 Theoretical Inq. L. 127, 138ff (2009), (elaborating on the concept of dependence and obligation, i.e. that the capabilities essential to "human flourishing," on which they base their theory of property, "cannot be acquired by individuals in isolation by themselves"); *see also* Gregory S. Alexander,

The property institution regulates a multitude of heteroclite relationships and resources, both tangible and intangible. [57] The unqualified equation of copyright with private tangible property in *Michelin* reflects an absolutist and monolithic approach to property as opposed to a contextual approach looking in each case at the justifications or "property-specific justice reasons"[58] that withstand the property right in question. Copyright and its exceptions and limitations should allow the mediation between copyright holders' exclusive rights and the exercise of freedom of expression and other fundamental rights when they come in conflict. [59] The statutory and jurisprudential limitations on copyright holders' exclusive rights allow for the resolution of conflicts between competing interests and, in the case of *Michelin*, in a way that is even more apparent now than it was at the time judgment was rendered.[60] Without getting into the actual merit of CAW Union's defence under the *Charter* and the tests it had to fulfill to be successful, *Michelin* illustrates the pitfalls of a monolithic absolutist property approach to copyright, and gives cause for concern.[61]

To distance the nature of copyright from property is no

The Social-Obligation Norm in American Property Law, 94 Cornell L. Rev. 745, 795-96 (2009) ("[p]rivate ownership of those aspects of a society's infrastructure upon which the civic culture depends comes with special obligations"); Alexander, *id.* at 775ff, 791ff (defining two forms of property limitations "entitlement sacrifices" and "use sacrifices").

[57] HARRIS, *supra* note 8, at 4, 348 (noting, "[i]t is a mistake to assume that either we must align property in information with property in other resources or else we must exclude information from the property agenda. Property-institutional design may be and should be much more flexible than these alternatives allow." *See also* Mossoff, *supra* note 19, at 40-41; Newman, *supra* note 38, at 79 ("[t]he problems addressed by ownership of tangible things are not identical in all respects to those that underlie ownership of intellectual works, and careless property-based rhetoric can lead to error. But the areas of commonality are great, and we should not be too quick to conclude that property is always the problem and never the solution"); Richard A. Epstein, *What is So Special about Intangible Property? The Case for Intelligent Carryovers*, N.Y.U. L. & ECON. WORKING PAPERS, Paper 243, *available at* http://lsr.nellco.org/nyu_lewp/243.

[58] These are the reasons that can be invoked to justify a property institution. *See* HARRIS, *supra* note 8, at 168.

[59] One example is the objectives embedded in some of the allowable purposes of the fair dealing or the exercise of fair use as exceptions to copyright infringement.

[60] I.e., parody or satire, which could have been invoked in that case, was not a listed purpose under the fair dealing exceptions to copyright infringement, but Canada Copyright Modernization Act, *supra* note 4, added parody or satire as a listed purpose to § 29.

[61] The analysis of the potential conflicts between the exclusive rights conferred by copyright and the First Amendment or freedom of expression, is beyond the scope of this article. For a discussion on these conflicts, *see* NETANEL, *supra* note 30; Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1(2012).

guaranteed panacea against the expansionist tendencies of copyright that we have witnessed in recent years. The declared self-standing statutory nature of copyright in some jurisdictions[62] has not stopped it from expanding, independently of equating copyright to property.[63] In respect of the trespassory powers and economic benefits that are presumed to be within the domain of copyright holders, copyright is often described as conferring inflated rights on copyright holders, compared to other property rights. Applying economic theory, Mark A. Lemley observes that copyright law allows copyright holders to benefit from positive externalities of their ownership rights to a degree that is not observed for other types of tangible property:[64]

> . . .society in general doesn't prohibit free riding. Internalization of positive externalities is not necessary at all unless efficient use of the property requires a significant investment that cannot be recouped another way. And even then, economic theory properly requires not the complete internalization of positive externalities but only the capture of returns sufficient to recoup the investment. Only where there is a tragedy of the commons do we insist on complete or relatively complete internalization of externalities.[65]

This is the result, according to Lemley, of a focus by the courts on the benefit of those externalities, i.e. "free riding," and on the assumption that such benefits are necessarily unjust.[66]

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[62] For example, *see Compo Co., supra* note 16, at para. 23; *Society of Composers, Authors and Music Publishers of Canada, supra* note 16, at para. 82.

[63] *See* discussion, *supra* Part I (the references to the progressive expansion of copyright); *see* also discussion, *infra* Part III. A.(i) (copyright expansionism).

[64] Lemley, *supra* note 18, at 1033 ("[c]ourts and commentators adopt—explicitly or implicitly—the economic logic of real property in the context of intellectual property cases. They then make a subconscious move, one that the economic theory of property does not justify: they jump from the idea that intellectual property is property to the idea that the IP owner is entitled to capture the full social value of her right").

[65] Lemley, *supra* note 18, at 1050. *See also Menell, supra* note 19, at 744-45, where the author notes that one of the important differences between intellectual property and tangible property is precisely that there is no tragedy of the commons and hence no need that every component of the artificially created resource scarcity should necessarily be owned.

[66] Lemley, *supra* note 18, at 1044. In *Euro-Excellence Inc., supra* note 19, at para. 85, Bastarache J., in his dissenting reasons applied a similar reasoning when he emphasized that Canada's *Copyright Act* does not protect all "positive externalities" of a copyright work but "only the legitimate economic interests of copyright holders." Bastarache J. proposed a narrower interpretation of Canada's Copyright Act, *supra* note 2, at § 27(2), by seeking to define what were the legitimate economic interests of the copyright holder in the case at hand: "Section 27(2) of the Act is meant to prohibit secondary infringement resulting from the wrongful appropriation of the gains of

One can think of many examples that illustrate Lemley's analysis of copyright as capturing a large number of positive externalities.[67] Increasingly, the legitimacy of the cornerstone of copyright law, i.e. the exclusive right to reproduce copies of copyright works, needs to be reconsidered in the digital environment. Certain copies are not likely to threaten the creator-incentive primary justification of copyright, for instance, when a consumer makes copies purely for convenience purposes. The statutory allowance in some jurisdictions that permits users to make copies for private purposes without copyright holders' consent and without remuneration, is a recognition that reproductions for private purposes do not unreasonably interfere, if at all, with copyright holders' exclusive rights.[68] A more controversial example is when the owners of commercial copies of copyright works make copies for family members or close friends. It is not always clear that the additional copies would be competing with the exclusive economic rights of copyright holders. In other words, even had the family members or close friends not been provided with the copy, they may not have ever purchased the copy of the copyrighted work. Making copies for family members or close friends can enhance other goals of copyright and could even benefit copyright holders, for example, by encouraging the beneficiaries of the burned copies to go to a concert or to buy the complete CDs or download other songs from the same musicians.[69] Nevertheless, in most cases, the rights and remedies that generally support the exclusive right to reproduce, lead to the inference that something is being taken away from copyright holders because someone made additional copies of the work without authorization or compensation.[70]

There are several other illustrations of copyright holders' ability to capture the positive externalities of their ownership rights, even

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another's skill and judgment by way of the acts enumerated in paras (*a*) to (*c*). Conversely, other economic interests – although they may seem to be closely associated with the interests legitimately protected as emanating from that skill and judgment – are not protected. In particular, if a work of skill and judgment (such as a logo) is attached to some other consumer good (such as a chocolate bar), the economic gains associated with the sale of the consumer good must not be mistakenly viewed as the legitimate economic interests of the copyright holder of the logo that are protected by the law of copyright."

[67] Lemley, *supra* note 18.

[68] Canada Copyright Act, *supra* note 2, §§ 29.22, 79ff.

[69] *See generally* Jessica Litman, *Lawful Personal Use*, 85 Tex. L. Rev. 1871, 1881, 1911-12 (2007), (developing parameters to help define what the scope of lawful personal use should be in US copyright law, based on whether the use in question enhances what the author describes as "copyright liberties" and the extent to which the use would undermine the incentive to create). *See also* Chapdelaine, *supra* note 55, at 199-223 (discussing the theoretical justifications of copyright and copy ownership).

[70] *See* Canada Copyright Act, *supra* note 2, §§ 3, 27, 34.

above and beyond what tangible property would allow. For example, the narrow application courts have given to the non-substantial-part doctrine (or similar doctrines), which allows uses of copyright works without copyright holders' authorization.[71] Another example is the "incidental inclusion" exception to copyright infringement (or similar doctrine).[72] This "incidental inclusion" exception provides a limited exception to the inclusion of a work (e.g. a painting) in another work (e.g. a documentary film), but only if the use of the first work is incidental and not deliberate.[73] Thus, other than for uses of the work that are incidental and not deliberate, any other positive externalities of a copyright work, even if quite minimal, fall within the exclusive domain of the copyright holder. By contrast, the use of a vase or a desk lamp not subject to copyright (or to any other intellectual property right) is not subject to any form of restriction from the maker of the vase or desk lamp and the vase or desk lamp can be used freely in the documentary film, a positive benefit of owning that vase or desk lamp. Overall, the various exceptions to the exclusive rights of copyright holders are perhaps even more revealing of the extensive scope of copyright holders' exclusive rights than the exclusive rights conferred by copyright law to copyright holders.[74] To name a few, educational institutions' specifically enumerated and carved-out exceptions,[75] the reproduction for private purposes exception, the later listening or viewing exception, and the computer program limited copying

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[71] In Canada, the non-substantial part doctrine, derived from Canada Copyright Act, *supra* note 2, § 3, is the doctrine according to which users can make any reproduction, performance in public, or publication of a *non-substantial part* of copyright works without the authorization of the copyright holders. Acts performed on non-substantial parts of copyright works are outside the realm of copyright holders' exclusive rights and can be performed without compensation to copyright holders and without infringing copyright. *See* DAVID VAVER, COPYRIGHT LAW 143ff (2000); MCKEOWN, FOX ON CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS ch. 21, 14ff (Carswell 4th ed. 2003). In the U.S., the substantial similarity test to establish copyright infringement and the application of the *de minimis* principle to the doctrine of fair use embed similar concepts to that of the non-substantial part doctrine in Canadian copyright law: 17 U.S.C. § 106 (2006), which lists the exclusive rights of copyright holders, does not refer to the exclusive right to reproduce (and other acts) the work or a *substantial part*. For a review of the case law on these two applications of the *de minimis* principle in U.S. copyright law, *see* Andrew Inesi, *A Theory of De Minimis and a Proposal for its Application in Copyright*, 21 BERKELEY TECH. L.J. 945, 960-69 (2006). The author describes that in the case of fair use, the *de minimis* principle applies principally to the fourth factor considered to establish fair use, i.e., "the effect of the use on the market for, or value of, the original work."

[72] *See, e.g.*, Canada Copyright Act, *supra* note 2, at § 30.7.

[73] *Id.*

[74] *See, e.g.*, 17 U.S.C. §§ 107-20 (2006); Canada Copyright Act, *supra* note 2, §§ 29-32.2. (for exceptions to copyright infringement set out in the Copyright Act).

[75] *See* Canada Copyright Act, *supra* note 2, §§ 29.4–30.04; 17 U.S.C. § 108 (2006).

exceptions for compatibility and backup purposes are illustrative of the far-reaching scope of copyright.[76]

If copyright holders benefit from even more positive externalities than owners of other forms of tangible private property, the reason for such expansionist tendencies must be sought elsewhere than copyright being assimilated to property by lawmakers, the judiciary, and commentators. Expansionism is not the proper argument to exclude copyright from the property institution.[77] In *The Future of Ideas*, Lessig invites us to rethink the current scope of property (including intellectual property), as well as broader legal and other frameworks under which we operate, to fully seize the opportunity and face the challenges of the Internet revolution.[78] For Lessig, the concept of property as the basis on which prosperity has been made possible is confusing us, but to question the scope of property is not to question property itself.[79]

To adequately respond to mischaracterizations or misplaced applications of underlying concepts of property, the debate on the nature of copyright needs to center on substantive considerations. It would be misguided and confusing not to call copyright property simply for fear that the designation of copyright as a form of property interest will lead to absolutism, if copyright shares the attributes of property at a substantive level. It is not so much the *propertization* of copyright that may lead to expansionism, but rather a misinformed application of the concept of property to copyright, and the view that overlooks the existence of equally meritorious competing property rights and the operation of property's intrinsic limitations.[80] As I argued above, distancing copyright from property is no safeguard against copyright's progressive expansion.[81] The *sui generis* nature of copyright can be invoked to limit its scope as much as it can be invoked to expand it.[82] The proper application of the property framework to copyright may in fact lead to more constraining effects on the scope of copyright than would otherwise be the case.[83]

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[76] *See* Canada Copyright Act, *supra* note 2, §§ 29.22-29.23, 30.4.

[77] PENALVER & KATYAL, *supra* note 38, at 39, 42 (describing intellectual property as being distinct from and far more complex than tangible property, while at the same time sharing important similarities with tangible property).

[78] LESSIG, *supra* note 34, at 5-6.

[79] *Id.* at 5-6; *see also* LESSIG, *supra* note 30, at 172.

[80] Newman, *supra* note 38, at 259-67.

[81] *See* discussion *supra* Part II.

[82] *Id.*

[83] *See* Newman, *supra* note 38 (reflecting on the nature of property and on how it commands standardized and predictable rules that are not subject to the personal preferences of others; demonstrating how the application of a rigorous and

The peculiarity of copyright and the strong political undercurrents surrounding its nature make the study of copyright through the lens of property law and theory all the more valuable, in an effort to debunk misconceptions about property and how its inept application may contribute to an inflation of copyright. For instance, what is the *resource* within copyright that can be the object of property and what is the nature of copyright holders' powers and privileges over the physical embodiments of their works that are owned by consumers and other users? These are among the questions that an investigation into the property attributes of copyright seeks to answer.

III. THE PROPERTY ATTRIBUTES OF COPYRIGHT

The abstract nature of copyright, that is, its uncontained simultaneous reach to multiple objects owned by different persons, offers a field of study of high interest to property and copyright theorists alike. Copyright, like other forms of intellectual property, challenges our common understanding of property as it relates to tangible resources. My objective here is to examine the property attributes of copyright primarily through James Harris theory of property in *Property and Justice*,[84] with the aim to respond to some of the fears about the assimilation of copyright to property discussed earlier.[85] The application of the ownership spectrum developed by James Harris and its focus on the person-to-resource relationship, allows me to separate two distinct features of copyright that previously tend to have been blended or overshadowed by the right to exclude:[86] the bundle of rights as an object of commodification, and the more limited rights that copyright holders have with respect to copies of copyright works.[87]

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consequentialist property approach to copyright would constrain rather than expand the current scope of the exclusive rights that copyright confers).

[84] *See* HARRIS, *supra* note 8. Commentators have examined the property attributes of copyright through James Harris' theory. *See, e.g.* Lior Zemer, "What Copyright is: Time to Remember the basics" 4 BUFF. INTELL. PROP. L.J. 54 (2006). While other commentators examine the property attributes of intellectual property and copyright, more generally, within the property institution. *See, e.g.*, James E Penner, THE IDEA OF PROPERTY IN LAW 118-20 (1997); HARRIS, *supra* note 8, at 42-46; SPENCE, *supra* note 28, at 13-16; DUSOLLIER, *supra* note 17, at 314-21; Lametti, *supra* note 20; PENALVER & KATYAL, *supra* note 38, at 39-50.

[85] *See* discussion *supra* Part II.

[86] *See* Gordon, *supra* note 10, at 1366 (examining the property entitlements of copyright through the right to exclude, the privilege to use, and the power to transfer copyright; emphasizing the right to exclude as a predominant feature of property and copyright); *see also* Breakey, *supra* note 10.

[87] *See* HARRIS, *supra* note 8, at 5 (stating the ownership spectrum spans from "mere property" to "full-blooded ownership").

James Harris defines the essence of every property institution as the twin manifestation of trespassory rules[88] and the existence of an ownership spectrum.[89] The various forms of ownership share in common: (i) a juridical relation between a person and a resource,[90] (ii) privileges and powers that are open ended[91] and (iii) that authorize self-seekingness by the owner.[92] Harris influential conception of property[93] offers one among numerous accounts of the main attributes of property and of the nature of ownership.[94] The "twin-manifestation" framework that Harris proposes to define property emphasizes the "bundle of rights" characteristic that is often ascribed to property, as well as supported by the power to exclude, opposable to all.[95] Commentators have defined the distinctive nature of property in different ways: e.g. as being the power to exclude more than the bundle

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[88] *See* HARRIS, *supra* note 8, at 25, 87 (defining "trespassory rules" as all rules which, by reference to a resource, impose any obligations upon an open ended range of persons, with the exception of some privileged individual, group, or agency. They are open-ended, and give rise to various civil or criminal remedies such as damages, possessory recovery, injunction or restitution, and they presuppose the existence of a separate, reasonably identifiable resource).

[89] *Id.* at 5 (stating the ownership spectrum spans from "mere property" to "full-blooded ownership").

[90] This implies the ability to identify each and separateness between the two. *See* HARRIS, *supra* note 8, at 332; Penner, *supra* note 84, at 105-28.

[91] *See, e.g.,* Civil Code of Quebec, S.Q. 1991, c. 64, art. 947 (Can.) (defining the right of ownership as "the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law").

[92] *See* HARRIS *supra* note 8, at 65 (explaining that self-seekingness refers to this intimate relationship between the owner and the resource as to how she chooses to dispose of the resource, with prima facie no duty to account to any one for the merit or rationality of that preference).

[93] *See* PROPERTIES OF LAW: ESSAYS IN HONOUR OF JIM HARRIS (Endicott et al. eds., 2006).

[94] *See* TONY HONORÉ, OWNERSHIP IN TONY HONORÉ MAKING LAW BIND, ESSAYS LEGAL AND PHILOSOPHICAL 161, 165-79 (1987) (discussing the concept of ownership and providing a detailed account of the incidents of ownership which include, the right to possess, the right to use, the right to manage, the right to the income and capital of the thing, the right to security and the duty to prevent harm; *see also* JAMES O. GRUNEBAUM, PRIVATE OWNERSHIP (1st ed. 1987) (developing a theory of "autonomous ownership" that is divided in three main categories based on the nature of the resource that is owned, i.e., domains of land and resources, domains of self and labour and the domain of "mixed ownables").

[95] *See* HARRIS, *supra* note 8, at 5 (describing property institutions as encompassing the twin manifestation of trespassory rules and the presence of an ownership spectrum which comprises powers and privileges between a person and a resource that are *prima facie* open-ended).

or rights and vice versa,[96] or both[97], or neither.[98] Conceptions of property include the "thing"[99] or a relation; either person-to-person,[100] person-to-things,[101] or person-to-person through things.[102] The emphasis on certain characteristics over others involves selecting and discriminating among concepts that reflect diverse values.[103] One should guard against attempts to impose too much uniformity when describing property, as uniformity can limit its ability to adapt and evolve.[104] Rather, each form of property right needs to be contextualized in accordance with its underlying objectives and the

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[96] *See, e.g.,* WALDRON, *supra* note 42, at 294 (stating that the essential characteristics of property are, the right to exclude others from the use of a resource, the exclusive right to determine what shall be done with a resource, and the power to alienate one's rights over a resource on whatever terms one thinks appropriate; emphasizing how the freedom of choice in the economic sphere is of paramount importance). *See also* HONORÉ, *supra* note 94; STEPHEN R. MUNZER, A THEORY OF PROPERTY, 22-7 (1990) (building upon the works of Hohfeld and Honoré; emphasizing the bundle of incidents of property as they relate to objects).

[97] HARRIS, *supra* note 8, would likely fall in that category.

[98] *See* HANOCH DAGAN, PROPERTY VALUES AND INSTITUTIONS, 40-1 (2011).

[99] *See* MUNZER, *supra* note 96, at 16-17 (describing this definition of property as the laymen's view as opposed to a more sophisticated view of property which defines it through relationships between persons and objects). *See also* Henry E. Smith, *Property as the law of things*, 125 HARV. L. REV. 1691 (2012) (criticizing the bundle of stick or bundle of rights theories of property and argues that we need to replace the "thing" at the centre of property as a "law of modular things" as supported or explained through information costs justifications).

[100] *See* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); HARRIS, *supra* note 8, at 121-24(reviewing Hohfeld's theory of property interests to conclude that Hohfeld's account of property interests that focuses on relationships is incomplete and explains why we cannot dispense of the person-thing relationship). *See also* MUNZER, *supra* note 96, at 17-22 (analyzing and critiquing Hohfeld's contribution to defining the dynamics within property).

[101] *See* HARRIS, *supra* note 8, at 142 (viewing property as "interests in things"). For a discussion on the theories emphasizing the "person to person" and "person to thing" essential characteristics of property, *see* Lisa Austin, *Person, Place, Or Thing? Property And The Structuring Of Social Relations*, 60 U. TORONTO L.J. 445 (2010).

[102] *See* David Lametti, *Concept of Property: Relations through Objects of Social Wealth*, 53 U. TORONTO L.J. 325, 355 (2003). For an overview of different conceptions on the nature of property, *see* Munzer, *supra* note 96, at 16-17. For a recent review of the various theories and ongoing debates about the nature and main characteristics of property, *see* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531,541-51 (2005).

[103] *See, e.g.,* DAGAN, *supra* note 98, at 44 (explaining how an over emphasis on the power to exclude as the rule and the limitations as exceptions evacuates the notion of social responsibility embedded in property). *See also* Lametti, *supra* note 102, at 377.

[104] *See* DAGAN, *supra* note 98, at 43 (stating that too much uniformity "would undermine the freedom-enhancing pluralism and the individuality-enhancing multiplicity so crucial to the liberal ideal of justice").

nature of the resource to which it pertains.[105] According to Harris, we need to understand the underlying "property-specific justice reasons" that withstand each form of property to determine its proper scope.[106] Harris' tailored approach to the nature of the resource and the underlying reasons for its legal protection is highly pertinent to our discussion on the effect of characterizing copyright as property. Harris' "one size does not fit all" account of property invites us to look at the nature of the resource, e.g. copyright, enabling the differentiation of copyright from tangible property.

To what extent are the features that are common on the ownership spectrum described by Harris present in the case of copyright, and to what extent does copyright give rise to trespassory powers? In answer to the second question, copyright confers a list of exclusive rights on copyright holders with respect to their works, with correlative trespassory powers that are opposable to all.[107] Copyright law dictates when primary and secondary infringements to copyright occur,[108] as well as the remedies that are available to copyright holders.[109] The remedies for copyright infringement include injunction, statutory and other damages, accounts, and delivery up.[110] Further, criminal sanctions can be imposed, i.e. fines or imprisonment.[111]

To answer the first question, i.e. the extent to which copyright shares the characteristics that are common to all ownership interests, I will apply each of the three features on the ownership spectrum to determine whether copyright shares the basic characteristics of property as a *resource* that can be owned.[112] I will then consider how copyright interferes with the personal property rights of owners of commercial copies of copyright works and will complete the analysis of the property attributes of copyright by a discussion on the standardization of property.[113]

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[105] *Id.* at 42.

[106] *See* HARRIS, *supra* note 8, at 168.

[107] *See, e.g.*, 17 U.S.C. §§ 501-11 (2006); Canada Copyright Act, *supra* note 2, at §§ 27-28.2 (enumerating the primary and secondary infringements of copyright and of moral rights "for any person" who does certain acts without the consent of the copyright holder).

[108] *Id.*

[109] *See* 17 U.S.C. §§ 505, 509-10 (2006); Canada Copyright Act, *supra* note 2, at § 34ff.

[110] *Id.*

[111] *See* 17 U.S.C. § 506 (2006); Canada Copyright Act, *supra* note 2, at § 42(1) (allowing a fine of up to one million dollars imprisonment not exceeding five years upon conviction or indictment).

[112] *See* HARRIS, *supra* note 8, at 5.

[113] *See* discussion *infra* Parts III.B and Part III. C.

A. Copyright on the Ownership Spectrum

i. Juridical relation between a person and a resource

The requirement of a juridical relation between a person and a resource on the ownership spectrum implies that the person and the resource can be identified, as well as separateness between the two.[114] Every property institution also implies a scarcity in resources and an exercise of wealth allocation.[115] In the case of copyright, the state creates an artificial scarcity through copyright laws, to prohibit the unauthorized reproduction and other acts that could otherwise be performed freely with respect to a work of authorship.[116]

Copyright statutes frequently refer to the "ownership of copyright" or "copyright owners."[117] Without getting into the requirements of authorship, in relation to copyright, the *person* is generally identifiable as the author (joint authors) or other copyright holder(s) of the work.[118] Views diverge on the *resource* with which the author or copyright holder has a legal relationship. Commentators looking into the property attributes of copyright have referred to the resource or property as being the intangible work,[119] or the bundle of exclusive rights,[120] or the monopoly that copyright confers.[121]

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[114] *See* HARRIS, *supra* note 8, at 332; Penner, *supra* note 84, at 105-28 (requirement for any property institution).

[115] *See* HARRIS, *supra* note 8, at 24.

[116] *Id.* at 42-3; Lemley, *supra* note 18, at 1055.

[117] *See, e.g.*, Canada Copyright Act, *supra* note 2, at § 2 (referring to "exclusive distributor" and "infringing"); §§ 2.2, 2.7, 3, 14, 17, 24, 27, 27.1 (referring to ownership in relation to copyright); 17 U.S.C. §§ 201-05 (2006) (titled "Copyright Ownership and Transfer"); Copyright, Designs and Patents Act, 1988, c 48, §§ 2, 16 (U.K.) (referring to the exclusive rights of the "owner of copyright" or "copyright owner").

[118] *See, e.g.* Canada Copyright Act, *supra* note 2, at § 13 (providing that the author of the work is the first owner of the copyright therein, as well as the circumstances under which the first owner of the copyright in the work is a person other than the author (e.g., the employer)); §§ 6.1, 6.2, 77 (addressing situations where the author is unknown or cannot be located). *See also* 17 U.S.C. § 201 (2006) (discussing the difficulties that arise in the identification of authors of works and other creators in intellectual property law); SPENCE, *supra* note 28, at 25-9.

[119] *See, e.g.*, HARRIS, *supra* note 8, at 42-8 (referring to the object protected by intellectual property as "ideational entities"). *See also* DUSOLLIER, *supra* note 17, at 316-21 (reviewing the various theories on the nature of copyright and also the conceptual difficulties around the qualification of copyright as property).

[120] *See* SPENCE, *supra* note 28, at 15-16; DUSOLLIER, *supra* note 17, at 316-21 (reviewing the various theories and also the conceptual difficulties around the qualification of copyright as property; citing proponents of that view like H.-J. LUCAS, TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 31, (A. Lucas et. al. eds., 2d ed. Paris 2001)

[121] *See* Penner, *supra* note 84, at 118–20 (reviewing and critiquing various characterizations of the "thing" or property, when analyzing copyright as a form of

Each of the propositions describing the object of property that is owned in the case of copyright is deficient to some extent. To claim that copyright holders own their work is problematic to the extent that their correlative trespassory powers do not forbid uses by others of their works once they are published. [122] One of the core objectives of copyright is to encourage the dissemination of works. [123] The trespassory powers that copyright confers on copyright holders once their works are published only allow them to restrict others from performing specific acts on their works.[124] To state that the object of copyright holders' ownership is a monopoly is also deficient to the extent that it does not describe adequately the powers and privileges that copyright confers.[125] It is also somewhat disappointing to claim that copyright holders' ownership pertains to a bundle of exclusive rights, for the same reason that to describe property through rights and relationships without reference to a resource is somewhat defective and incomplete.[126] Failure to take into account the role of the resource and the dynamics that revolve around the resource leaves out important distinctive features that set property apart from other legal institutions.[127]

The shortcomings of characterizing the resource that copyright holders can own as the intangible work or as the bundle of exclusive rights diminish when we combine the two objects: the resource with which authors or copyright holders have a direct legal relationship is

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property); SPENCE, *supra* note 28, at 13-16. *See also* DUSOLLIER, *supra* note 17, at 317-21 (discussing different approaches in qualifying copyright as property, either through the intangible work or through the bundle or exclusive rights that copyright law confers to authors).

[122] *See* Penner, *supra* note 84, at 118-19; SPENCE, *supra* note 28, at 13-14. *See also* Lametti, *supra* note 20, at 279-82; DUSOLLIER, *supra* note 17, at 318-21.

[123] *See* U.S. Const., art. I., § 8 (providing that "[t]he Congress shall have Power. . .[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); *see also* Galerie d'art du Petit Champlain Inc. v. Théberge, [2002] S.C.C. 34, para. 30 (Can.).

[124] *See* SPENCE, *supra* note 28, at 13-14. A distinction needs to be made between published works and unpublished works. In the latter case, the trespassory powers of authors to their works are greater. *See* HARRIS, *supra* note 8, at 43-4.

[125] *See* SPENCE, *supra* note 28, at 15 (observing that a monopoly generally denotes an undue power on specific products in a given market and that it is unlikely that copyright would ever have that effect, given its protection to specific works of art (and given that copyright protects the expression of ideas, not the ideas themselves)).

[126] *See, e.g.,* HARRIS, *supra* note 8, at 121-24 (stating we cannot dispense of the "person-thing" relationship to describe property and critiquing Hohfeld's theory of property based on the correlation of rights; in the context of the characterization of copyright, *see also* DUSOLLIER, *supra* note 17, at 317-18.

[127] *Id.*

the *bundle of exclusive rights as they relate to the work.*[128] When copyright holders license or assign their copyright, it is the work, with its unique attributes and qualities that is the object of interest and scrutiny. The work, while not the object of ownership *per se*, cannot be evacuated from the "person-thing" relationship and is necessary, both as an intangible entity and in its material form, for an ownership interest to arise.

While copyright is generally associated with incorporeal or intangible property,[129] it exists only to the extent that a creation materializes and becomes a work, which attaches a corporeal or physical element to copyright. The fixation requirement warrants eligible works[130] to be *fixed* in some materially identifiable form to be protected by copyright.[131] The separateness of copyright in the work from the copyright holder and from all others is fulfilled by the fixation requirement, which is consistent with the idea-expression dichotomy, i.e. the fact that copyright protects the expression of ideas, not the ideas themselves.[132] As a result, the resource with which copyright holders have a legal relationship is the *bundle of exclusive rights as they relate to the work as materialized.*

Pinning down more precisely the *resource* that copyright holders *own* is not a trivial exercise. The exercise reveals that the work *per se* cannot effectively be the object of ownership in property terms and reveals the inadequacy of *ownership of the work* as inaccurate property parlance. Applying property concepts to copyright by reference to *ownership of the work* expands the nature of copyright beyond what it is and ever was. Copyright holders cannot *own* their work: the nature of copyright makes this relationship between copyright holders and lawful copies of their work impossible. However the progressive expansion of the scope of protection of copyright, in particular, the introduction of technological protection measures, the exclusive right of creators to control the distribution of copies of their works, the

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[128] *See, e.g.*, Canada Copyright Act, *supra* note 2, at §§ 3, 15, 18, 21, 26; SPENCE, *supra* note 28, at 15 (conveying a similar idea but seems to focus more on the exclusive rights conferred by copyright as being the object of ownership; however, the link to the underlying work as part of the object is not stated explicitly).

[129] *See* Civil Code of Quebec, S.Q. 1991, c. 64, art. 899 (Can.); R. HUGHES, S. PEACOCK & N. ARMSTRONG, *supra* note 19, at 101.

[130] *E.g.*, Canada Copyright Act, *supra* note 2, § 5 (stating copyright shall subsist in "every original literary, dramatic, musical and artistic work" that fulfills the requirements of the Act); *see also* 17 U.S.C §§ 102-03.

[131] *See* Canada Copyright Act, *supra* note 2, at § 2 ("Fixation" is not defined in the Act, however, the Act requires, explicitly, that computer programs, dramatic works and sound recordings be fixed to fall under the application of the Act).

[132] *See* Lametti, *supra* note 20, at 279; *Galerie d'art du Petit Champlain Inc.*, *supra* note 123, at paras. 25, 145.

make-available right, and the rental right, created an unprecedented rapprochement between copyright holders and their works.[133]

While copyright requires a work to take a *fixed* physical form to exist, the material embodiment of the work (e.g. copies of books, musical recordings, films, etc.) is an entity separate from copyright.[134] Copyright and the material embodiment(s) of the work that copyright protects are generally owned by different parties, i.e. copyright holders own the copyright in the work while consumers and other buyers own the books, musical recordings, DVD films, or computer program CDs that embody the protected work.[135] At the same time, copyright confers privileges and powers on copyright holders on the copies and material embodiments of works which I will discuss below.[136] The insight that copyright holders do not own their work in property terms is a powerful response to counter the claim that copyright holders are entitled to control every access, use, transfer of their works. Expansionist views of the scope of copyright are increasingly made possible through new technological means of control and dissemination of works and completely trivialize the inherent tension that has always subsisted between the competing property rights of users and copyright holders.

Unlike other forms of property, the juridical relation that subsists between copyright holders and copyright is limited in time.[137] When the term of copyright expires, the work it protected falls into the public domain. The limited duration of a right is no stranger to the property institution. For example, in the civil law tradition, the real rights of emphyteusis and usufruct (each considered as a dismemberment of the

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[133] *See* Chapdelaine, *supra* note 55, at 96-102, 149-55 (discussing the progressive expansion of copyright in subject matter, scope and enforcement mechanisms, as well as technological protection measures).

[134] *See, e.g.*, 17 U.S.C. § 202 (2006) (providing "[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyright work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object"). In France, *see* Code of Intellectual Prop. art L.111-3 (making the distinction clear: the intangible property defined by article L.111 - 1 is independent of the ownership of the material object. . .[t]hese rights remain in the person of the author or his successors in title who, however, may not require the owner of the material object their provision of this object for the exercise said rights).

[135] *Id.*

[136] *See* discussion *infra* Part III. B.

[137] *See* Canada Copyright Act, *supra* note 2, at § 6. *But see*, Xifaras, *supra* note 15, at 411 (who views the limited duration of copyright as incompatible with the concept of property).

right of ownership) have a limited duration of up to 100 years.[138] In the case of copyright, the law artificially *extinguishes* the resource by conferring a limited duration to copyright, allowing the property rights subsisting in it to expire.[139] During the term of copyright, a juridical relation subsists between copyright holders and copyright, which fulfills the first characteristic common to all forms of ownership on the ownership spectrum.[140]

ii. Open-ended privileges and powers

The second feature common to all ownership interests on the ownership spectrum is that the privileges and powers that a person has in a resource are *prima facie* open-ended.[141] The open-ended texture of powers and privileges distinguishes ownership interests from other non-ownership proprietary interests that confer specific privileges and powers.[142] At first sight, the list of exclusive rights that copyright confers on copyright holders to perform or authorize certain acts with respect to their works have a closed texture to them,[143] which for some commentators disqualifies copyright as a form of property.[144] While copyright confers a defined list of exclusive rights, the manner by which copyright holders can share, exploit, license, subdivide, and transfer copyright is open-ended.[145] Copyright holders can "use" their copyright by modifying and adapting the work protected by copyright or by producing derivative works from it. They also have the freedom not to make use of the copyright, which, unlike other forms of intellectual property, does not lead to the possible extinction of the right.[146] There

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[138] *See* Civil Code of Québec, S.Q. 1991, c. 64, art. 1119, 1123, 1197 (Can.).

[139] The instrumental incentive-based justification of copyright supports a limited duration of copyright, i.e. the period necessary to incentivize creation and dissemination of works.

[140] *See also* DUSOLLIER, *supra* note 17, at 316-17 (rejecting the argument that the limited duration of copyright should discard the qualification of copyright as a form of property).

[141] *See* HARRIS, *supra* note 8, at 5.

[142] *See, e.g.,* HARRIS, *supra* note 8, at 55-58 (easements would fall under the category of non-ownership proprietary interests).

[143] *See, e.g.*, Canada Copyright Act, *supra* note 2, at §§ 3, 15, 18, 21, 26 (listing the exclusive rights conferred on copyright holders); *see also* 17 U.S.C. § 106 (2006).

[144] *See, e.g.,* DUSOLLIER, *supra* note 17, at 319.

[145] *See* HARRIS, *supra* note 8, at 42-46. *See also* Shyamkrishna Balganesh, *Alienability and Copyright Law*, in CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW 161 (Helena Howe et al. eds., 2013) (emphasizing that the power to alienate and subdivide in infinite ways the bundle of exclusive rights conferred by copyright as an important feature of copyright).

[146] For example, in Canada, the absence of the use of a trade-mark for an extended period of time can lead to it being expunged from the trade-marks registry. Canada Trade-Marks Act, R.S.C. 1985, c. T-13, § 45(3) (Can.).

is also an open-ended texture to copyright, in that the exclusive powers it confers can give rise to legal interpretation and uncertainty.[147] While copyright confers a defined list of exclusive rights on copyright holders, it allows a broad range of privileges and powers of exploitation and myriad interchangeable scenarios that have an open-ended texture to them. From that perspective, the second characteristic that is required for an interest to be on the ownership spectrum is met.

iii. Privileges and powers that authorize self-seekingness to the owner

The third feature common to all ownership interests on the ownership spectrum is that the privileges and powers that a person has in the resource confers privileges and powers that authorize self-seekingness for the owner. [148] *Self-seekingness* is the intimate relationship between the owner and the resource as to how the owner chooses to dispose of the resource, with *prima facie* no duty to account to any one on the merit or rationality of that preference.[149] By its design, copyright confers self-seekingness on copyright holders.[150] It is a central feature of the operation of copyright that copyright holders may decide how, when, and to whom they want to dispose of copyright, with no duty to account to any one on the merit or rationality of that choice.[151] As the Supreme Court of Canada noted in *Robertson v Thomson Corp*,[152] on the issue of whether freelance authors had impliedly or not licensed the right to the *Globe and Mail* newspaper to republish their articles in electronic databases: "parties are, have been, and will continue to be, free to alter by contract the rights established by the *Copyright Act*."[153] While the modalities for the exercise of self-

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[147] *See* Canada Copyright Act, *supra* note 2, at § 3 (stating "'Copyright', in relation to a work, means the sole right to produce or reproduce the work. . .and *includes* the sole right. . .") (emphasis added); *see also* Menell, *supra* note 19, at 744-45.

[148] *See* HARRIS, *supra* note 8, at 5.

[149] *Id.* at 65.

[150] *Id.* at 46.

[151] For instance, Canada Copyright Act, *supra* note 2, at § 13(4) provides: "The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof"; *Id.* at § 14.1(1) also supports the self-seekingness interest aspect of copyright through moral rights, i.e., the right to the integrity of the work and the right to be associated with the work, which can be invoked by authors (i.e. physical persons). However, moral rights *per se* are inalienable (but they can be waived). *Id.* at § 14.1(2); *see also* 17 U.S.C. § 201(d) (2006).

[152] Robertson v. Thompson Corp., [2006] 2 S.C.R. 363 (Can.).

[153] *Id.* at 385. Other cases illustrate the broad freedom that copyright holders have on the terms under which they make their copyright works commercially available,

seekingness may vary between an individual author and a corporate copyright holder, self-seekingness is present in both cases.[154]

To sum up, in addition to conferring trespassory powers, copyright shares to a large extent the three characteristics that are common on Harris's ownership spectrum. There is a juridical relation between copyright holders and copyright that confers powers and privileges that have a certain *prima facie* open-ended texture and that authorize self-seekingness to copyright holders. While copyright displays unique features, it fulfills the characteristics that are common on the ownership spectrum as a resource that can be owned. From a property theory perspective, copyright holders' powers and privileges to the embodiments of their works display specific characteristics that I will now investigate further.

B. Copyright Holders' Powers and Privileges to Embodiments of Their Works

I have argued above that the *resource* to consider when assessing whether copyright shares the attributes commonly associated with property is the bundle of exclusive rights that copyright law confers on a work as materialized.[155] It is the combination of the exclusive rights and their relation to *the work as materialized* (not the work itself, or the physical embodiment of the work) that together form a species of intangible personal property.[156] The physical embodiment through which copyright and the work it protects come to life (e.g. the books, musical recordings, film DVDs) is not the resource on which copyright holders exercise their *prima facie* open-ended powers and privileges, as with other forms of tangible property.[157] The physical embodiments of copyright works are separate *resources*, that is, distinct forms of personal property.[158]

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beyond the terms of their constitutive legislative act. For example, cases where courts uphold the characterization made by copyright holders of the transaction on the copy of a copyright work as a license, rather than as a sale. *See Vernor v Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010). *See also* Pascale Chapdelaine, *The Ambiguous Nature of Copyright Users' Rights*, 26 INTELL. PROP. J. 1, at 15-28 (2013) (discussing the interaction between copyright as conferred by statute and copyright holders' exercise of freedom of contract).

[154] I.e., corporations may be subject to internal rules of governance or specific authorizations that would affect how they would make decisions with respect to the exclusive copyright that they hold in a work but to the outside world, they generally have open-ended powers and privileges in how they exploit the copyright they hold, with no duty to account for the preference of their choice.

[155] *See* discussion *supra* Part III. A(i).

[156] *Id.*

[157] *See* discussion *supra* Part III. A(ii).

[158] *Id.* This is after the first publication has occurred. Before the first publication of

In addition to the *immediate* powers and privileges that copyright holders have with respect to copyright, copyright holders have *remote* specific rights over the material embodiments of their works.[159] The rights that copyright confers on copyright holders in the embodiments of their works owned by consumers and other users have been compared to a negative easement,[160] with the difference that in the case of copyright, the property interest pertains to the personal property of others and not real property.[161] Others have made an analogy of the relationship copyright holders have with the embodiment of their works to a usufruct, one of the dismemberments of ownership in the civil law tradition.[162] The remedies available to copyright holders in case of infringement include injunctive relief, and gaining physical control over embodiments of works, such as by seizure and delivery up of infringing copies of copyrighted works.[163]

While the bundle of exclusive rights that copyright law confers on a work as materialized displays the attributes of property with *prima facie* open-ended powers and privileges in how copyright holders exploit it,[164] copyright holders' specific rights to interfere with the physical embodiment of their works as owned by consumers and other users are specific and remote and do not have the *prima facie* open-ended texture that is common to all ownership interests on the

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the work, the exclusive right to authorize the first publication confers exclusionary powers on the physical embodiment of the work as well. *See* HARRIS, *supra* note 8, at 43-44.

[159] Julie E. Cohen, *Overcoming Property: Does Copyright Trump Privacy?*, 2002 U. ILL. J.L. TECH. & POL'Y 375, 377 (2010) (stating "copyright law gives copyright owners (some) rights in things as proxies for rights in works").

[160] *See* Christopher M. Newman, *Patent Infringement as Nuisance*, 59 CATH. U. L. REV. 61, 106 (2009) (stating that a distinction needs to be made between negative easements that arise from the existence of copyright and negative easements or servitudes in commercial copies of copyright works that are potentially created by copyright holders through contract).

[161] Except for some copyright works, e.g. architectural works. Servitudes typically apply to real property and courts have been reluctant to enforce servitudes on personal property or chattels. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 18 (2000); Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449 (2003); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008).

[162] Lametti, *supra* note 20, at 281-82 (highlighting how copyright holders cannot use the physical embodiment of their work owned by others (*usus*) unless they simultaneously own the physical embodiment of the copyright work together with the copyright; while copyright holders control, to a large extent, the economic activity that can be performed with that physical embodiment of the copyright work (e.g., reproduction and some rental rights) (*fructus*), they do not control the transfer of the physical embodiment when such physical embodiment is owned by another party and that they had authorized the first sale of that physical embodiment (*abusus*)).

[163] *See, e.g.*, Canada Copyright Act, *supra* note 2, at § 34(1).

[164] *See* discussion *supra* Part III. A(ii).

ownership spectrum.[165] Copyright holders' close-ended and remote powers on the embodiments of their works, owned by consumers and other users, are a form of non-ownership proprietary interest.[166] The constrained non-ownership proprietary interest in the embodiment of works contrasts with expansive property language whereby copyright holders *own* their work.[167]

As commercial copies of copyrighted works distributed online lose their physical object embodiment, as non-negotiated standard end-user agreements increasingly provide that copyright holders retain ownership in the copies, and given the uncertain application of the exhaustion or first sale doctrine, the rights of copyright holders over the physical copies of their works made available to consumers are potentially expanding.[168] The new methods of distribution of commercial copies of copyright works raise questions related to the nature of copyright holders' interest in the copies. Can copies with no physical object embodiment be owned? If so, do copyright holders effectively retain ownership in the copies they distribute as provided by the terms of the contract? In the case of commercial copies made available to consumers for an indefinite duration (in contrast with a service), it seems that copyright holders' rights over the copies would still lack the open-endedness that distinguishes ownership from other property interests, regardless of the terms of contract.[169] Copyright holders' rights in commercial copies distributed online with contract terms restricting consumers' ability to transfer their copies would create an interest akin to a non-ownership proprietary interest, to the extent that such restrictions are valid and enforceable.[170]

Copyright holders' rights in relation to the embodiment of works owned by consumers are a non-ownership proprietary interest that is

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[165] *See* HARRIS, *supra* note 8, at 55-58 (stating non-ownership proprietary interests are specific, as they lack the prima facie open-ended powers and privileges generally associated with ownership interests, e.g. easements are non-ownership proprietary interests).

[166] *Id.*

[167] *See* discussion *supra* Part III. A(i) (elaborating on the resource to which copyright holders have a legal relationship as not being the copyright work itself and the consequences thereof).

[168] *See* Chapdelaine, *supra* note 55, at 84-90 (discussing the effects of the current application of exhaustion or the first sale doctrine; *see also* Chapdelaine, *supra* note 153 (discussing the interaction between copyright, contracts, and technological protection measures).

[169] *See* discussion *supra* Part III. A(ii); Chapdelaine, *supra* note 55, at 287-97 (discussing the distinction between goods and services and how it is inconsistently applied to commercial copies of copyright works).

[170] *See* Chapdelaine, *supra* note 55, at 237-49, 305-12 (discussing the scope of the exhaustion or first sale doctrine, and the interaction between copyright, contracts and technological protection measures).

being transformed in the online distribution environment. I will now turn to the standardization of property and how copyright fares with the *numerus clausus* principle.

C. Copyright and the Standardization of Property

The standardization of property, or *numerus clausus,* is the principle by which there is a fixed and closed list of property interests recognized by law and as one corollary, limits how owners can alter the nature of their property rights.[171] This concept is generally understood to be part of the civil law tradition, although it is not immune from inconsistencies in its application.[172] The civil law typically enumerates the entitlements of ownership[173] and its possible dismemberments.[174] The restriction on exercising "the right to dispose of property" is explicitly prohibited, except in limited circumstances,[175] and is subject to specific conditions.[176] There is a growing recognition that a similar principle exists in the common law of property.[177] Thomas Merrill and Henry Smith conducted a survey to demonstrate that the same principle exists in the common law of property, although not uniformly and without bearing any specific appellation.[178] For Merrill and Smith, *numerus clausus* is best described as a "norm of judicial self-governance" rather than as a statutory or constitutional tool of interpretation.[179] I will focus here on how copyright, as a form of property sits with the *numerus clausus* principle. There are many other

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[171] *See* HARRIS, *supra* note 8, at 58.

[172] Lametti, *supra* note 102, at 360-61 (discussing how *numerus clausus* applies in the Québec civil law system).

[173] *See* Civil Code of Québec, S.Q. 1991, c. 64, art. 947 (Can.) (defining ownership as "the right to use, enjoy and dispose of property fully and freely . . . .").

[174] *See* Civil Code of Québec, S.Q. 1991, c. 64, art. 1119 (Can.) (listing the dismemberments of ownership as "usufruct, use, servitude and emphyteusis" and confirming that they are real rights).

[175] *See* Civil Code of Québec, S.Q. 1991, c. 64, art. 1212 (Can.) (prohibiting restrictions on this right, except by gift or will).

[176] *Id.* (stating that the stipulation must be in writing and is only valid "if it is temporary and justified by a serious and legitimate interest"); *see also* Civil Code of Québec, S.Q. 1991, c. 64, art. 1214 (Can.) (providing that the stipulation "may not be set up against third persons unless it is published in the proper register").

[177] *See* Merrill & Smith, *supra* note 161; Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002). *See also* Dagan, *supra* note 28, at 4 (supporting the *numerus clausus* principle within the institutions of property).

[178] *See* Merrill & Smith, *supra* note 161, at 9-23.

[179] *Id.* at 11 ("Jurisprudentially speaking, the *numerus clausus* functions in the common law much like a canon of interpretation, albeit a canon that applies to common-law decision making rather than statutory or constitutional interpretation, or like a strong default rule in the interpretation of property rights").

aspects to *numerus clausus* that I will not discuss here, including how the principle can serve the function of calibrating the effects of the property regime created by copyright statutes and copyright holders' freedom of contract.[180]

Copyright may not fare so well on the terrain of the *numerus clausus* principle compared to other forms of property.[181] On the one hand, certain features of copyright fulfill, it would seem, the requirements of the *numerus clausus* principle. Copyright like other forms of intellectual property, are relatively well-known and stable forms of property.[182] The list of exclusive rights that copyright confers on copyright holders is reasonably well-defined and identifiable.[183] Copyright holders can assign their copyright in whole or in part (e.g. with respect to the exercise of one exclusive right only), and for partial assignments copyright law treats the assignee and assignor as copyright holders for the part assigned and for the part retained.[184] The assignee is then free to assign his copyright (or partial copyright) to subsequent assignee(s). An analogy can be made between partial assignments and divided co-ownership of tangible property.[185] There are formality requirements for copyright assignments to be valid which corroborate to some extent the standardization of property.[186] While copyright law confers on copyright holders broad discretionary powers as to how they can authorize others to perform the acts reserved to them by copyright

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[180] *Id.* at 5-6 (stating the *numerus clausus* is "an extremely important qualification to the freedom of contract." Through the application of *numerus clausus*, courts will generally be reluctant to enforce contracts that are meant to alter the bundle of rights that apply to a resource in a form other than known property rights).

[181] *See* Newman, *supra* note 160, at 105ff.

[182] *See* Merrill & Smith, *supra* note 161, at 19 (noting the protection of intellectual property by statute, specifically, patents and copyrights are stable forms of property, and within the U.S., the federal pre-emption doctrine restricts alterations of IP interests at the state level).

[183] *See* U.S.C. § 106 (2006). *See also* Canada Copyright Act, *supra* note 2, at §§ 3, 15, 18, 21, 26.

[184] *See* Canada Copyright Act, *supra* note 2, at § 13(5) (stating "where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, with respect to the rights so assigned, and the assignor, with respect to the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and this Act has effect accordingly"). *See also* 17 U.S.C. § 201(d) (2006).

[185] *See* Civil Code of Québec, S.Q. 1991, c. 64 art. 1010 (Can.) (defining divided co-ownership as "where the right of ownership is apportioned among the co-owners in fractions, each compromising a physically divided private portion and a share of the common portions").

[186] The assignments do not need to be registered. *See* Canada Copyright Act, *supra* note 2, at § 13(4) (quoting that "no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent."); *see also* 17 U.S.C. § 204 (2006).

(*qua* duration, territory, type of exclusive right, and among an open-ended group of individuals), only exclusive licenses create a separate proprietary interest and are subject to formality requirements.[187] By contrast, non-exclusive licenses confer contract rights.[188] On that basis, copyright could exemplify the *numerus clausus* principle.

On the other hand, copyright may be an outlier to the *numerus clausus* principle in other respects. Given the intangible nature of copyright, courts may be more inclined to interpret the scope of copyright and other intellectual property in a less predictable manner than in relation to tangible property.[189] Copyright can be assigned in whole or in part in multiple ways, creating a potentially infinite list of co-exiting lesser forms of proprietary interests. The creation of new proprietary interests runs counter to the *numerus clausus* principle, increasing search costs for future copyright assignees.[190] Copyright, unlike other forms of property including real estate, patents, and to some extent trademarks, [191] does not necessarily need to be registered in order for a copyright holder's work to be protected.[192] Registration plays an important notification function for third parties about the existence and scope of property rights that are consistent with the standardization of property. However, registration is neither a constitutive element of all property interests nor is it necessary with respect to all forms of property to assert title.

To the extent that copyright shares the attributes of property, the concern is not so much whether copyright conforms to the *numerus clausus* principle as it is justifying why copyright needs to comply as much as possible with the *numerus clausus* principle as a norm of governance for the judiciary and law- and policy-makers.[193] To what

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[187] *See supra* Part III. A(ii) (discussing copyright holders' open-ended powers and privileges to exploit their exclusive rights); *see also* Canada Copyright Act, *supra* note 2, at § 13(4-7); *Robertson*, *supra* note 152, at para. 56 (*citing* Ritchie v. Sawmill Creek Golf & Country Club Ltd., [2004] 35 C.P.R. (4th) 163 (Can.)).

[188] *Id.*

[189] *See supra* Part II (focusing on the discussion of *Michelin*, *supra* note 19).

[190] *See* Merrill & Smith, *supra* note 161, at 27.

[191] *See* Canada Patent Act, R.S.C. 1985, c. P-4 (stating that inventions need to be registered as patents to confer exclusionary powers to patent holders); Canada Trade-Marks Act, R.S.C. 1985, c. T-13 (stating trademarks can be registered but unregistered trademarks can also benefit from protection).

[192] *See, e.g.,* Canada Copyright Act, *supra* note 2, at § 54 (stating registration of copyright is optional). *See also* 17 U.S.C. § 205 (2006); Berne Convention, *supra* note 1, at art. 5(2) (providing that the enjoyment and exercise of rights with respect to protected works shall not be subject to any formality requirements).

[193] *See* Chapdelaine, *supra* note 55, at 133-38 (discussing the justifications for the application of the numerus clausus principle); *see also* Harvard Law Review Note, *A Justification for Allowing Fragmentation in Copyright*, 124 HARV. L. REV. 1751 (2011) (discussing the necessity of maintaining fragmentation in copyright).

extent are the concerns favoring the standardization of property in the realm of tangible property similar in the field of intangible property, e.g. copyright? In addition to asking whether copyright exemplifies the *numerus clausus* principle, the application of the principle to copyright holders' commercial practices that alter consumer property rights in copies of copyright works is a different question of high interest that is beyond the scope of this article.[194]

To sum up, two distinct proprietary interests emerge when looking at copyright through the lens of property law and theory. The first interest relates to copyright as a whole when considered as the object capable of commercial exploitation. It contains all three elements that are common on the ownership spectrum and confers trespassory powers to copyright holders.[195] The resource is not the copyright work *per se*, but the *bundle of exclusive rights as they relate to the work as materialized.*[196] The requirement of *prima facie* open-ended powers and privileges is fulfilled differently than with respect to tangible forms of property.[197] While the list of exclusive rights is relatively closed and defined, the exploitation or uses that copyright holders can make of their copyright are endless.[198]

The second interest focuses on the nature of copyright holders' relationship with the physical embodiment of their works (e.g. the commercial copies owned by consumers or other users). Copyright holders' relationship with the embodiment of their works emerges as a limited non-ownership proprietary interest.[199] Unlike copyright when viewed as a whole, it lacks the open-ended powers and privileges that are required to qualify as an ownership interest.[200] Finally, the application of the *numerus clausus* principle to copyright as a norm of judicial governance merits further investigation, in particular given the intangible nature of copyright and the non-rivalrous nature of the resource that it protects.[201]

IV. CONCLUSION

The characterization of copyright as a form of private property is

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[194] *See* Chapdelaine, *supra* note 55, at 197-99, 260-66 (discussing the *numerus clausus* principle as it applies to copy ownership).

[195] *See* discussion *supra* Part III. A.

[196] *See* discussion *supra* Part III. A(i).

[197] *See* discussion *supra* Part III. A(ii).

[198] *Id.*

[199] *See* discussion *supra* Part III. B.

[200] *Id.*

[201] *See* discussion *supra* Part III. C.

controversial and politically charged.[202] The analysis of the property attributes of copyright that I conducted here is revealing and provides responses to some of the concerns raised in the debate about the nature of copyright. First, copyright parlance and rhetoric about copyright holders *owning their works* is far removed from the concept of property and from how copyright is typically constructed by statute. By design, copyright statutes do not institute such a relationship between copyright holders and lawful copies of their works and likely never will.[203] Also, copyright holders' right in the embodiments of their works (e.g. commercial copies made available to consumers) is a remote, specific proprietary right that does not belong on the ownership spectrum. Second, as a corollary to the first observation, there is reason to be concerned about erroneous property language whereby copyright holders *own* their works: it obliterates the framework of copyright as it exists. To be sure, what is troublesome is not that copyright is a limited form of property, but an erroneous and potentially dangerous application of the concept of property to copyright.

No doubt the scope of copyright has been expanding in recent years. A fallacious application of property concepts and its consequences can be achieved perhaps more easily with intangible property such as copyright, than with respect to tangible property, given its abstract and ubiquitous nature. While the characterization of copyright as property should not be the cause for its expansion, in turn, the progressive expansion of copyright brings copyright closer to the common understanding of property.[204] As I argued in this article, negating the property nature of copyright altogether is problematic legally and normatively and cannot counter the expansion of copyright. Defining copyright as a *sui generis* right is no guarantee against the expansion of copyright. At the same time, the application of property law and theory to copyright, as the one that I presented here may reveal the limited scope of copyright.

The increased threat to the legitimacy of copyright calls for more coherence. Property provides a robust legal and theoretical framework to address complex questions around competing rights and interests, including consumers' rights to commercial copies of copyright works. By nature and design, copyright statutes provide a very incomplete enunciation of copyright holders' and other participants' rights and obligations. While copyright statutes need to rely on underlying institutions of property and contracts, the peculiar nature of copyright

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[202] *See* discussion *supra* Part III.

[203] *See* discussion *supra* Part III. A.

[204] *See* NETANEL, *supra* note 30, at 55.

constantly puts its interaction with these institutions to the test. The pursuit of understanding copyright through the lens of existing legal institutions, such as property, and, to a certain extent contract, is a pledge toward greater coherence in the law, which may offer a better guarantee of the ability of copyright to evolve within broader spheres of interest and to retain its legitimacy.